STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARY MONTESANTO	:	DETERMINATION DTA NO. 809840
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through May 31, 1988.	:	

Petitioner, Mary Montesanto, 3 Hampden Road, Copiague, New York 11726, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through May 31, 1988.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 23, 1992 at 10:45 A.M. Petitioner submitted a brief on September 25, 1992, the Division of Taxation submitted a brief on August 25, 1992 and petitioner submitted a reply brief on October 8, 1992. Petitioner appeared by Stewart Buxbaum, C.P.A., and Kenneth J. Bulko, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether a request for a conciliation conference is valid when it misstates the number of the notice of determination being protested.

II. Whether an accountant purportedly representing petitioner filed a power of attorney or a notice of appearance and whether he would therefore be entitled to a copy of notices sent to petitioner under the terms of Executive Law § 168 and 20 NYCRR 2390.3.

III. Whether the accountant, Mr. Klinghoffer, informed the conciliation conferee of his change of address so that he could be notified of the conferee's order.

IV. Whether a letter containing an order denying a conciliation conference was received by petitioner's accountant, Mr. Klinghoffer, so as to commence the limitation period for filing a

petition with the Division of Tax Appeals.

FINDINGS OF FACT

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on August 4, 1988 under Articles 28 and 29 of the Tax Law against petitioner, Mary Montesanto, for the period June 1, 1985 through May 31, 1988 in the amount of $22,562.78, plus penalty of $5,577.71 and interest of $4,766.02, for a total amount due of $32,906.51. (The amount for the last quarter was stated to include an amount due from a bulk sale of business assets.) The notice was numbered S880804706C.

On September 21, 1988, the Bureau of Conciliation and Mediation Services ("BCMS") of the Division of Taxation ("Division") received a "petition for revision of a determination" from petitioner. This was treated as a request for a conciliation conference. This petition was stated to be for sales and use taxes due for the period August 31, 1985 through April 13, 1988. It identified the notice number as S880804708C. (The last digit of this number is different from the number on the notice of determination issued August 4, 1988.) A representative was listed as Leonard Klinghoffer of 7000 Boulevard East, Guttenberg, New Jersey 07093. Both petitioner and Mr. Klinghoffer signed this petition.

On September 30, 1988, BCMS wrote to Mr. Klinghoffer requesting that he file a power of attorney. This letter was addressed to 7000 Boulevard East, Guttenberg, New Jersey 07093.

In April 1989, Mr. Klinghoffer moved his home and office from 7000 Boulevard East to 7004 Boulevard East of the same city.

(a) A power of attorney form (Department's Form DTF-14) was introduced into evidence. Petitioner's signature on the form is not dated and not notarized. Mr. Klinghoffer signed the Notice of Appearance section at the bottom. His address on this form was stated to be 7000 Boulevard East.

(b) Petitioner testified that the power of attorney form was signed by both herself and Mr. Klinghoffer at her home in Copiague, New York, and that Mr. Klinghoffer took the form with him to attend the conciliation conference. Mr. Klinghoffer testified that, rather, he mailed

the form to BCMS. In any event, this purported power of attorney did not inform the Division of any change of address of Mr. Klinghoffer since the address listed was his former address.

(a) A conciliation conference was held on June 14, 1989. Leonard Klinghoffer attended that conference. Petitioner did not attend. The conferee was Michael Mancini. The conference appears to have been confined to Mr. Klinghoffer's description of the legal status of petitioner's activities and the conferee's request for further documentation thereof.

(b) Mr. Mancini's record of that conference states that a power of attorney was not tendered, but was asked for. Nothing is stated about a new address for Mr. Klinghoffer. The record notes that Mr. Klinghoffer had been very late and had complained of car trouble.

(c) Mr. Klinghoffer's testimony at hearing concerning the conference (occurring three years prior to the hearing) must be rejected. The questioning of the Division's attorney (and his memo after the hearing) very ably point out the problems with this testimony. Mr. Klinghoffer relies only on his memory and not on records. His claim to have notified the conferee of a change in address seems to be based on a presentation of a power of attorney which, as pointed out above, actually lists only his old address. He did not deny or explain the conferee's record that he had been late and had complained of car trouble. Mr. Klinghoffer could not remember whether he submitted documents either at or after the conference and, in fact, changed his answer on this during the hearing twice. His apparent certainty on certain matters (that he mailed a power of attorney to the conferee) are contradicted by the equally certain testimony of petitioner herself (that he carried the power of attorney to the conference). Some answers were phrased as what he "would have" done.

On July 20, 1989, the conciliation conferee wrote to Mr. Klinghoffer requesting documentation he had been promised at the conference and also requesting a power of attorney. This was addressed to the 7000 Boulevard East address.

(a) A Conciliation Order denying the request for conciliation was prepared and dated September 8, 1989. This order referred to the notice number in issue as S800804706C. This is the number on the notice of determination issued on August 4, 1988.

(b) Petitioner did not recall receiving the Conciliation Order and explained that her "schooling is not really good." She did not talk to Mr. Klinghoffer about it or take any other action concerning it until "after a judgment" was entered.

(c) Mr. Klinghoffer claims he did not receive a copy of the order. He offered no corroboration for his claims.

(d) The custom and practice in the mailing of conciliation orders has been described for the record in two affidavits, one from the Supervisor of Tax Conferences and the other from the Principal Mail Clerk. These can be paraphrased as follows: The word processing unit of BCMS when preparing a conciliation order and envelope also prepares a "certified mail record" ("CMR") to record the mailing of certified mail. This lists for each day the name and address of each addressee and the amounts of postage and fees which will be paid. Both the order and the CMR are sent to a clerk who verifies the addresses on the envelopes with the CMR. She also assigns and affixes a "certified control number" to each envelope and lists it on the CMR. (This number, judging from the CMR in evidence, has nine digits preceded by a "P". Such a number appears on each certified mail receipt issued by the U.S. Postal Service [PS Form 3800] and which is attached to each envelope.) The clerk carries the envelopes and CMR to the Department's mail room. A mail room clerk verifies the number of envelopes against the number listed on the CMR. He also verifies the addresses on the envelopes against those on the CMR. The clerk then delivers the envelopes and CMR to the Roessleville Branch of the Albany, New York Post Office. The next day a clerk goes to the Post Office and picks up the CMR, date stamped by the Post Office. Both affidavits affirm that, based on the CMR for September 8, 1989, the Conciliation Order here in question was in fact mailed as the Division alleges. The affidavit of the Supervisor of Tax Conferences states also that while conciliation orders are sent by certified mail, "BCMS does not ordinarily request certified mail return receipts . . . ."

(e) The mailing record submitted is as follows:

The caption lists the name and address of BCMS and its identity, CMR "conciliation

orders issued September 8, 1989". It lists in table form for each item sent the certified number, the name and address of the addressee, the postage, the fees and has a space for remarks. Across the bottom are spaces for the number of pieces listed, the number of pieces received by the Post Office and for the name of the Post Office's receiving employee. The numbers written in are "15". The name written in is illegible though it appears distinctive enough to be recognizable by the signer himself. The page submitted in evidence bears an imprint, apparently from a stamp, of "Sept 8 1989". If there is a remaining portion of this stamp, it is much too faint to be read. The CMR also bears a larger stamp of BCMS bearing a date of October 2, 1989.

(f) The Postal Service's employee upon accepting a firm mailing bill is directed to "count the items, postmark and receipt the bill for the total number. Indicate time of mailing if requested, and return the bill to the sender" (Domestic Mail Manual, § 912.45[f]). (The Domestic Mail Manual, "DMM", is incorporated by reference into the Code of Federal Regulations by 39 CFR 111.1.)

(g) How and when petitioner or Mr. Klinghoffer learned of the Conciliation Order is not clear from the record. Since the Division has not put this in issue, it must be assumed it was within 90 days of the filing of the petition with the Division of Tax Appeals.

(a) A petition for a hearing before the Division of Tax Appeals referring to notice of determination number S880804706C (the notice issued on August 4, 1988) was received by the Division of Tax Appeals on August 5, 1991. This was signed by Stewart Buxbaum, C.P.A., as petitioner's representative. A power of attorney dated June 1, 1991 was attached in favor of Mr. Buxbaum and Mr. James Tully, Jr., an attorney.

(b) This petition states (among other things) that "the taxpayer's representative, Leonard Klinghoffer, never received a conciliation order" at his last known address of 7004 Boulevard East, Guttenberg, New Jersey and so the time to file a petition should still be open.

(c) The answer of the Division denies that Mr. Klinghoffer was petitioner's representative and that his last known address was 7004 Boulevard East.

CONCLUSIONS OF LAW

A. The request for conciliation conference was valid despite its failure to reference the correct number of the notice of determination being protested. (The number listed was apparently that of another party in the same bulk sale transaction.) It is clear that the conciliation conferee associated the request, timely filed, with the correct file and, in fact, the Conciliation Order issued itself referenced the correct notice number. The case cited by the Division to the contrary (Matter of Schnozz's, Inc., Tax Appeals Tribunal, February 22, 1991) is not on point. In that case, there was one audit leading to seven notices of deficiency, one of which was omitted from the petition for a hearing. There was no evidence that the recipient treated the petition as including the omitted year.

B. (1) The accountant, Mr. Klinghoffer, did not file a proper power of attorney. The only power of attorney exhibited at the hearing was not even notarized. Furthermore, the mere contact of a person with a Division official is not sufficient to qualify him as a representative entitled to copies of notices (Matter of Sliford Restaurant, Tax Appeals Tribunal, October 10, 1991). This is true even at conferences; there is no implicit recognition of such a person as a representative. It can be observed that the person purporting to be a representative can be heard merely as a witness (20 NYCRR 2390.6) and without violating the secrecy provisions of the Tax Law. Those provisions make it unlawful for any person with knowledge of the contents of a return or report filed under the sales and use tax "to divulge or make known in any manner any particulars set forth or disclosed in any such return or report" (Tax Law § 1146[a]). I must also reject any suggestion that the conduct of the conference somehow should prevent the Division from later denying that the person appearing was a representative so as to excuse compliance with the normal time requirements for filing petitions. Tax Law § 3002(c), as enacted by chapter 770 of the Laws of 1992, effective August 7, 1992, provides that:

> "the failure of an officer or employee of the Division to comply with a provision of the Tax Law shall not cure any procedural defect in an administrative or judicial proceeding . . . ."

(2) Mr. Klinghoffer did, however, file what is, in effect, a Notice of Appearance. In

this case, the original petition sent to BCMS must be taken as a Notice of Appearance. It is signed by Mr. Klinghoffer and lists him as petitioner's representative. A Notice of Appearance of an attorney in a court action does no more than this (see, e.g., 4 Carmody-Wait 2d, NY Prac § 26:20). I can also note that the portion of the Department's Form DTF-14 (see, Appendix 6 to the Department's regulations) is similar; the separate power of attorney form on the same page is not necessary to the notice of appearance.

(3) Having filed a notice of appearance, Mr. Klinghoffer is entitled to a copy of all notices sent to petitioner. It is true that Executive Law § 168 which requires copies to be sent is confined by its own terms to cases where there is an attorney-at-law. (Similarly, State Administrative Procedure Act § 307[1] requires copies of final decisions to be delivered to "each party and his attorney-of-record.") It is, however, very difficult for me to believe that the Legislature intended such important rights to be withheld from a citizen's representative who is not an attorney at least where that representation is proper under agency rules. In any event, the Department's regulation (20 NYCRR 2390.3) on this subject is not confined to attorneys. It extends the right to receive notices to any "attorney or agent". Therefore, Mr. Klinghoffer was entitled to a copy of the notice. The courts have held that the failure of a representative to receive a copy of a notice requires that the notice be treated as ineffective (Matter of Bianca v. Frank, 43 NY2d 792, 401 NYS2d 29 [tolling the limitation period for seeking court review]).

C. (1) Mr. Klinghoffer's testimony at hearing concerning the conference (occurring three years prior to the hearing) must be rejected. The questioning of the Division's attorney (and his memo after the hearing) very ably point out the problems with this testimony. Mr. Klinghoffer relies only on his memory and not on records. His claim to have notified the conferee of a change in address seems to be based on a presentation of a power of attorney which, as pointed out above, actually lists only his old address. He did not deny or explain the conferee's record that he had been late and had complained of car trouble. Mr. Klinghoffer could not remember whether he submitted documents either at or after the conference and, in fact, changed his answer on this during the hearing twice. His apparent certainty on certain matters (that he

mailed a power of attorney to the conferee) are contradicted by the equally certain testimony of petitioner herself (that he carried the power of attorney to the conference). Some answers were phrased as what he "would have" done.

(2) The accountant, Mr. Klinghoffer, did not notify the conciliation conferee of his change of address. I have already found as a fact, paragraph 6(c), that Mr. Klinghoffer's memory and testimony of the June 14, 1989 conference cannot be relied upon. I have also pointed out that the alleged power of attorney contained his old, and not his new, address. Petitioner obviously has the burden of proof on this issue and has failed to carry it. While petitioner complains in her brief that neither the conciliation conferee nor the auditor testified at the hearing, it is also true that at the hearing petitioner did not request their testimony. I can give full weight to their recorded statements (Matter of Gray v. Adducci, 73 NY2d 741, 536 NYS2d 40) and I will do so especially because it is extremely unlikely that the conferee or auditor will remember anything about the conference three years in the past or testify to anything different from what their records state concerning that conference.

D. (1) The Division did not properly mail the Conciliation Order to Mr. Klinghoffer. Tax Law § 1147(a)(1) states "[a]ny notice . . . may be given by mailing the same to the person for whom it is intended . . . to such address as may be obtainable." This section further states that such mailing "shall be presumptive evidence of the receipt of the same . . . ." Under this language, the Court of Appeals has held that the receipt of the notice is essential to its effectiveness. In doing this, the Court clearly distinguishes the mailing requirements in section 1147(a)(1) of the Tax Law from those in section 681(b) of the Tax Law governing income tax. Accordingly, it concluded that a notice which the Division conceded was returned to the Division marked "unclaimed" was not effective (Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517; see, Matter of Wheelin and Rockin, State Tax Commn., January 17, 1986 [TSB-H-86(113)S]). (Under the Income Tax Law an unclaimed notice would, as noted by the State Tax Commission, be treated as effective [Matter of Frank, State Tax Commn., June 19, 1986 (TSB-H-86[116]I)].) A subsequent court case held that a notice

tendered to and handled by the addressee, according to the affidavit of the Postal Service's letter carrier, was "received" within the meaning of the statute (Matter of American Cars "R" Us v. State Tax Commn., 147 AD2d 795, 537 NYS2d 672). From these cases it is clear, when mailing notices to a petitioner, that the risk of error on the part of the Postal Service is clearly on the Division.

(2) It is clear that the Division cannot prove (apart from the presumption of mailing) the receipt by Mr. Klinghoffer of the order in question. It has been held that as proof of mailing the Division can rely on the "returned postal receipt" (evidently Postal Form 3811) with a signature in the name of the taxpayer (Matter of Moreno v. State Tax Commn., 144 AD2d 114, 534 NYS2d 453). The Tax Appeals Tribunal has similarly relied on a return receipt (Matter of Kropf, Tax Appeals Tribunal, March 21, 1991; Matter of Wading River Deli, Ltd., Tax Appeals Tribunal, November 27, 1991; Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992; Matter of Blau Par Corporation, Tax Appeals Tribunal, May 21, 1992; Matter of Bryant Tool and Supply, Tax Appeals Tribunal, July 30, 1992). In this case, however, the Division has no return receipt (Postal Form 3811, "Domestic Return Receipt"; a green post card) from the Postal Service. It also does not have a "return receipt after mailing" (a yellow postcard) from the Postal Service. The Domestic Mail Manual provides for such a receipt. It states that "[t]he mailer may request a return receipt after mailing by completing a Form 3811-A . . ." (DMM 932.32[a]). That form requests the mailer to provide the certified number, the date of mailing and, of course, the address of the recipient. I note that a Form 3811-A was obtained by the Division in at least one decided case (Matter of Kropf, supra). I can further note that the Division has presented as witnesses no employees of the Postal Service nor has it presented any original records of the Postal Service.

(3) The presumption of mailing in Tax Law § 1147(a)(1) is of no help to the Division in this case. The language of Tax Law § 1147(a)(1) making a mailing "presumptive evidence" of receipt has been treated by the courts as restating the common law presumption to the same effect (see, Matter of T. J. Gulf v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d

97, 98). It is clear, of course, that the burden of proving mailing is on the sender (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826). In this case, the Division has the burden to prove that it mailed the letter in question to the taxpayer (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Avlonitis, supra). It is understandable, of course, that the standard of proof for mailing must be very high. The presumption is understood to be conclusive against the addressee's bare denial of receipt although, of course, he has no ordinary access to the records of the sender, who itself is an interested party (Nassau Ins. Co. v. Murray, 46 NY2d 828, 414 NYS2d 117). The degree of proof is especially important in cases under the Sales and Use Tax Law which involve the right of a taxpayer to petition for review of a determination of tax due. This is because the review procedures under the Sales and Use Tax Law do not permit a taxpayer to claim or sue for refund after a determination has been made and the taxes have been paid (Matter of Sliford Restaurant, Tax Appeals Tribunal, October 10, 1991). In contrast, under Personal Income Tax Law § 689, the inability of a taxpayer to obtain a hearing in a deficiency proceeding is curable by the taxpayer's ability to sue for refund after paying the tax (Bellis v. Commr., 57 TCM [CCH] 667, affd 935 F2d 273 [unpublished 89 Westlaw 70337, cert denied ___ US ___, 112 S Ct 308, 116 L Ed 2d 251). The Tax Appeals Tribunal has allowed an exception in sales tax cases, but only where the determination of tax due has been petitioned and upon review is found to be erroneous, unconstitutional or illegal (Matter of Allied Aviation Serv. Co., Tax Appeals Tribunal, June 27, 1991). In this case, the proof offered by the Division is troublesome in several respects. The proof of office practice is made by affidavits which, of course, might be tailored to each particular case rather than by reference to a regulation or an audit manual similar to the Internal Revenue Service's Audit Manual (2 Audit, Internal Revenue Manual [CCH], § 4462.1 at 7900-7902). Also there is no evidence that the particular order alleged to be mailed has been endorsed with the certified mail number which will be on the envelope (compare, Matter of Clark, Tax Appeals Tribunal, June 18, 1992 [an income tax case arising under Tax Law § 681(a)]). Furthermore, there is no evidence of any practice of endorsing the

certified mail record with the name or initials of the clerks who actually performed the duties. I notice that a practice of endorsing the mail record is mentioned in some sales tax cases (Matter of T. J. Gulf, State Tax Commn., May 29, 1985 [TSB-H-85(177)S, paragraph 5], confirmed 124 AD2d 314, 508 NYS2d 97; Matter of Peconic Bay Motors, Inc., Tax Appeals Tribunal, September 26, 1987). An endorsement is, it seems to me, essential to impress upon the clerk the sense of personal responsibility necessary for this duty. It is, of course, also necessary to enable supervisors to have controls on the operation and the necessity of such controls has been mentioned in court cases. Thus, one court said that "there must be evidence of an office practice geared to ensure the likelihood that the mailing is always properly addressed and mailed . . ." (Colyar v. Roberts, 129 AD2d 946, 515 NYS2d 330; emphasis supplied). The Court of Appeals itself has said:

> "[i]n order for the presumption to arise, office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed." (Nassau Ins. Co. v. Murray, supra; emphasis supplied.)

In fact, the New York courts have ruled that the specific testimony of the party's mailing clerk is essential to prove mailing by that parrty (William Gardam & Son v. Batterson, 198 NY 175; Rhulen Agency v. Gramercy Brokerage, 106 AD2d 725, 484 NYS2d 156; 57 NY Jur 2d, Evidence and Witnesses, § 159). In any event the Tax Appeals Tribunal itself has held in a sales tax case that a general description of customary procedure must be accompanied by "evidence that such procedure was followed in this case" (Matter of Novar TV & Air Conditioner Sales & Serv., supra; emphasis added). I can add that the practice of the Internal Revenue Service is to have the clerk endorse the mailing record for the stated reason that the clerk could then testify in a court proceeding (2 Audit, Internal Revenue Manual [CCH], § 4462.2[6] at 7901; see also, Trimble v. Commr., TCM [CCH] 1256, 1257). It is thus very clear that in Federal procedure a proper mailing log (Post Office Form 3877) includes an identification of the clerk who made out the form. In fact, the Federal cases further show that the auditor who generates the notice is identifiable from the records (Barrash v. Commr., 54 TCM [CCH] 1230, 1233) and the mail clerk who actually posts the notice likewise initials the

mail log (Munz v. Commr., 61 TCM [CCH] 2412) and even keeps a logbook of his own work (August v. Commr., 54 TC 1535, 1537), and, of course, the mail log itself provides for the signature of the Postal Service employee who receives the mail. In New York administrative practice, it would not be necessary for the clerk to be available to testify to justify the entry into evidence of the mailing record; however, petitioner has the right to call the clerk as a witness (see, Matter of Gray v. Adducci, supra). Still another failure of the documents in this case of course is the illegibility of the postmark and the receiving clerk's name on the certified mail record. The Tax Appeals Tribunal has criticized the use of mere initials without identifying the writer (Matter of Katz, Tax Appeals Tribunal, November 14, 1991 [an income tax case under Tax Law § 681(a)]). Perhaps the most troublesome failure of the Division, however, is the failure to obtain a return receipt. As I point out above, such a receipt can be requested by the sender even after mailing. It was therefore readily available to the Division and the decided cases show that the Division does sometimes request them (see, Matter of Kropf, supra). The Tribunal has stated, in a case which itself involved mailing, that where the Division fails to place in the record evidence which allows the resolution of a case, it will not carry its burden of proof (Matter of Bryant Tool and Supply, Tax Appeals Tribunal, July 30, 1992). A requirement that the Division produce a return receipt is, of course, far more convenient and efficient than would be the requirement that petitioner serve subpoenas on the United States Postal Service necessitating the spectacle of a parade of witnesses at a hearing. The requirement to produce such evidence is merely an application of the legal maxim that:

> "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (Blatch v. Archer, 1 Cowp 63, 65, quoted in Laffin v. Ryan, 4 AD2d 21, 27, 162 NYS2d 730, 736; see also, Kirby v. Tallmadge, 160 US 379, 383, 16 S Ct 349, 350-351).

The admonition to obtain return receipts has been made in one court decision involving a State agency (2647 Realty Co. v. Abrams, 138 Misc 2d 308, 312, 524 NYS2d 168, 171). Obtaining a return receipt would, of course, obviate some of the issues of credibility that arise in these cases and, I think, that is generally the duty of the Division as well as the taxpayer. It would also

hopefully reduce the number of cases on which hearings on these issues have to be held. That would be most welcome.

E. The petition of Mary Montesanto is granted. The petition for a hearing before this Division is timely and a hearing date on the merits will be set.

DATED: Troy, New York
April 29, 1993

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE